Dated: October 17, 2007

Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: RONALD E. SLOAN, JR. TRICA S. SLOAN, *Debtors.*	Case No. 03-34374 Judge L. S. Walter Chapter 7

DECISION GRANTING TRUSTEE'S MOTION TO REOPEN CASE AND MOTION TO WITHDRAW REPORT OF NO DISTRIBUTION

This matter is before the court on the Trustee's Motion to Reopen Case [doc. 13] and Trustee's Motion to Withdraw Report of No Distribution [doc. 14] (collectively referred to as the "Motions"), the Objection to the Motions filed by AK Steel Corporation [doc. 15], and the Trustee's Reply to the Objection [doc. 16]. A hearing was held on August 28, 2007 at which time the court heard the oral arguments of the parties and received stipulated exhibits before taking the matter under advisement.

FACTUAL BACKGROUND

The facts are simple, straightforward, and undisputed. Approximately eleven months prior to filing his bankruptcy case on May 23, 2003, Debtor Ronald E. Sloan, Jr. ("Debtor") filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission as well as a complaint in federal district court ("Discrimination Lawsuit") against AK Steel Corporation ("AK Steel") alleging employment discrimination (the EEOC proceeding and Discrimination Lawsuit are collectively referred to as the "Cause of Action"). Debtor did not disclose his Cause of Action in his bankruptcy schedules or any other filings and therefore the Trustee was unaware of this asset and did not administer it prior to the court's issuance of orders granting Debtor his discharge and closing the case.

More than three years later, on April 23, 2007, Debtor disclosed in his discovery responses to AK Steel in the Discrimination Lawsuit that he had filed a prior bankruptcy. On April 25, 2007, the Trustee, having been notified of the pending Discrimination Lawsuit by Debtor's trial counsel, filed his Motions in this case aimed at reopening the bankruptcy case and administering the Cause of Action as an asset of the estate.

LEGAL ANALYSIS

The essence of the Trustee's Motions is a request to reopen Debtor's bankruptcy case pursuant to 11 U.S.C. § 350(b) so that the Trustee can administer the previously undisclosed Cause of Action, presumably by intervening in the Discrimination Lawsuit as the real party in interest. AK Steel objects arguing that this court should not reopen the case because the Trustee is precluded from prosecuting the Cause of Action by principles of judicial estoppel. There is also pending in the Discrimination Lawsuit a motion for summary judgment filed by AK Steel against Debtor that likewise interposes judicial estoppel as a basis for dismissal.

The doctrine of judicial estoppel is aimed at protecting the integrity of the judicial process and it operates to prevent a party from "taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir. 1988) (citations omitted). AK Steel's objection raises a number of significant issues such as whether the Trustee and Debtor are the same "party" such that the Trustee may be estopped by virtue of Debtor's failure to disclose the Cause of Action in his bankruptcy case. However, this court ultimately cannot decide those issues because they are not ripe. Even if it is assumed that the Trustee is bound by Debtors nondisclosure, the Trustee has yet to take any position whatsoever in the lawsuit. Until he intervenes and asserts a position that is arguably inconsistent with a prior position, it is premature to apply judicial estoppel. As noted by the Sixth Circuit, "[j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990).

A motion to reopen a case is a very modest request, a quasi-administrative prerequisite to some anticipated substantive action. "The effect of [§ 350(b)] is merely to resurrect the court file from the stacks of the closed cases, or even from the archives, to enable it to receive a new request for relief." *In re David,* 106 B.R. 126, 128 (E.D. Mich. 1989). This modest action should not be confused with the substantive matter that is presumably to follow. *In re Leach,* 194 B.R. 812, 815 (E.D. Mich. 1996) ("The reopening of a case is of no independent legal significance or consequence.").

The decision whether to reopen a case to allow amendment of schedules is left to the sound discretion of the court. *Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539, 540-41 (6th Cir. 1985). It is certainly not inconceivable that the court might refuse to reopen a case where the

proposed recovery by the movant is patently unachievable or highly unlikely. *In re Herzig*, 96 B.R. 264, 266 (9th Cir. B.A.P. 1989) ("Where the chance of any substantial recovery for creditors appears 'too remote to make the effort worth the risk,' a trial court does not abuse its discretion in denying a motion to reopen.") quoting *In re Haker*, 411 F.2d 568, 569 (5th Cir. 1969). Consequently, while this court has no basis for evaluating the merits of the Cause of Action, it will review the judicial estoppel issue for the sole purpose of assessing the likelihood that the Trustee will be successful in his intended intervention in the Discrimination Lawsuit. In other words, the court will consider whether the Trustee's intended administration of the Cause of Action is so futile that he should be denied an opportunity to try. However, in making that assessment, the court is mindful that it has a duty to creditors to reopen a case where prima facie proof is presented that assets remain in the estate that have not been administered. *Herzig*, 96 B.R. at 266; *In re Mullendore*, 741 F.2d 306, 308 (10th Cir. 1984). *See also*, *In re Upshur*, 317 B.R. 446, 450 (Bankr. N.D. Ga. 2004) ("[W]hen the purpose of the motion to reopen is to add an undisclosed asset, the most important consideration is the benefit to the creditors.").

Upon review of the case law submitted by the parties, and the record before the court, it is not obvious that the doctrine of judicial estoppel will preclude the Trustee from pursuing Debtor's Cause of Action. In fact, it seems likely that the Trustee will prevail in his attempt to intervene and supplant Debtor as the real party in interest. It is true that AK Steel has cited numerous cases in which debtors have been estopped from prosecuting potentially valuable causes of action where they failed to disclose the cause of action during their bankruptcy cases. *See e.g.*, *In re Soult*, 894 F.2d 815, 818 (6th Cir. 1990); *Rosinski*, 759 F.2d at 542; *In re Smart*, 97 B.R. 380, 382 (Bankr. S.D. Ohio 1989); *In re Jones*, 174 B.R. 67 (Bankr. N.D. Ohio 1994). However, none of those cases address the issue of whether an innocent bankruptcy trustee acting on behalf of the estate is necessarily estopped simply because the debtor is.

On the other hand, at least one circuit court has held that a trustee is not estopped by the actions of a debtor in this context. In *Parker v. Wendy's International, Inc.*, 365 F.3d 1268 (11th Cir. 2004), the court held that judicial estoppel did not apply to prevent a chapter 7 trustee from intervening in and prosecuting an employment discrimination case previously brought by the debtor but not disclosed in her bankruptcy case because it was not the trustee who made the prior inconsistent statement to the courts. Debtor in the instant case, much like the debtor in *Parker*, never had a right to continue to pursue the Cause of Action once the bankruptcy case was filed. The Cause of Action became property of the estate at that point and the trustee, as representative of the estate, was the only party with standing. *Id. at* 1272. As a consequence, Debtor's post-petition conduct, including his failure to disclose the Cause of Action, does not relate to the merits of the Cause of Action and is not particularly relevant, because the Cause of Action did not belong to Debtor post-petition. *See Id.*

It is true, as AK Steel points out, that a trustee is generally subject to the same defenses as a debtor and is sometimes said to have "stepped into the shoes" of a debtor. But those defenses, such as a statute of limitations, would have been applicable to a debtor even if there had been no bankruptcy filing. *Id.* In the current circumstance, the judicial estoppel issue arose as a byproduct of the bankruptcy filing itself and the doctrine cannot apply because the trustee has never taken an inconsistent position and Debtor's alleged inconsistent position is not relevant because Debtor has no interest in the asset.

Based upon the reasoning in *Parker*, this court is persuaded that the Trustee's reopening of this bankruptcy case to pursue the Cause of Action is not an inherently futile endeavor. The Trustee is merely requesting an opportunity to pursue an asset that may benefit the unsecured creditors. The court will allow him that opportunity and hereby grants Trustee's Motion to Reopen Case [doc. 13] and Trustee's Motion to Withdraw Report of No Distribution [doc. 14].

SO ORDERED.

cc:

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